Filed 7/27/12 In re D.W. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re D.W., a Person Coming Under the Juvenile Court Law.	B235909 (Los Angeles County Super. Ct. No. CK88476)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. M.A., Defendant and Appellant; ALBERT W., Defendant and Respondent.	

APPEAL from orders of the Superior Court of Los Angeles County. Valerie Skeba, Referee. Reversed.

Maureen L. Keaney, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, Acting County Counsel, and Jeanette Cauble, Senior Deputy County Counsel, for Plaintiff and Respondent.

Marissa Coffey, under appointment by the Court of Appeal, for Defendant and Respondent.

M.A. (Mother) appeals from the August 29, 2011 jurisdictional and dispositional orders of the juvenile court adjudging minor D.W. a dependent of the court pursuant to Welfare and Institutions Code section 300, subdivision (b) (failure to protect), arising out of Mother's arrest in a high-speed car chase and subsequent incarceration.[1] The Department of Children and Family Services (DCFS) filed a letter of non-opposition to the appeal, conceding that the court's jurisdictional and dispositional orders "conflict with relevant case law." Albert W. (Father) contends that substantial evidence supported the court's jurisdictional and dispositional orders. We agree with Mother and DCFS that the court erred in asserting jurisdiction over D.W. on the basis that she is currently incarcerated and unable to care for D.W.

We reverse the jurisdictional and dispositional orders of the court.

BACKGROUND

On June 28, 2011, DCFS filed a petition pursuant to section 300, subdivision (b) on behalf of D.W., born in 2007, alleging in pertinent part that Mother is incarcerated and failed to make an appropriate plan for D.W. by placing her in the care of maternal grandmother, who on a prior occasion had physically abused Mother. DCFS filed a first amended petition on July 28, 2011. The amended and sustained petition alleged in its entirety that "[Mother] is incarcerated and is unable to care for [D.W.]"

Mother was arrested in a high-speed chase on March 13, 2011. While "still in the car from the chase," Mother phoned maternal grandmother and asked her to take care of

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[1] Statutory references are to the Welfare and Institutions Code.

D.W. and pick up D.W. from home, where a maternal cousin was looking after her. In June 2011, Mother told DCFS that she would be in jail for a few years and that she wanted D.W. placed with maternal grandmother or maternal great aunt. In late June 2011, after a team decision meeting, D.W. was placed with maternal great aunt. At the June 2011 detention hearing, the court ordered D.W. detained with maternal great aunt and reunification services to be provided to Mother and Father. DCFS reported that maternal great aunt, who was "caring" and "nurturing," provided a stable, secure, and safe environment for D.W.

Father submitted to jurisdiction at the jurisdictional/dispositional hearing on August 29, 2011. The court did not agree with DCFS that Mother's plan to place D.W. with maternal grandmother after Mother's arrest was inappropriate. It stated that Mother's plan was appropriate, but Father was "nonoffending and is entitled to custody." The court amended the petition to reflect that Mother is "currently incarcerated and unable to care for the child." The court sustained the amended petition, dismissed all counts related to Father, and adjudged D.W. a dependent of the court, finding that there was "[n]o reasonable means to protect [D.W.] without removal from the custody of [Mother]" and that Mother was "going to be incarcerated for over three years." The court ordered parenting, individual counseling, and family preservation services for Father; unmonitored visits for maternal grandmother four hours every other week; and permitted maternal grandmother to take D.W. to visit Mother.

This appeal followed.

DISCUSSION

We agree with Mother and DCFS that the juvenile court erred in adjudging D.W. a dependent child under section 300, subdivision (b) on the basis that Mother is incarcerated and is unable to care for D.W.

Section 300, subdivision (b) provides a basis for juvenile court jurisdiction if "[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child, or the willful or negligent failure of

the child's parent or guardian to adequately supervise or protect the child from the conduct of the custodian with whom the child has been left . . . ."

"A jurisdictional finding under section 300, subdivision (b) requires: '"(1) neglectful conduct by the parent in one of the specified forms; (2) causation; and (3) 'serious physical harm or illness' to the child, or a 'substantial risk' of such harm or illness." [Citation.]' [Citations.] The third element 'effectively requires a showing that at the time of the jurisdictional hearing the child is at substantial risk of serious physical harm in the future (e.g., evidence showing a substantial risk that past physical harm will reoccur).' [Citation.]" (*In re James R.* (2009) 176 Cal.App.4th 129, 135.)

Here, there simply is no evidence of serious physical harm or illness or a substantial risk of such harm to D.W. to bring her within the provisions of section 300, subdivision (b). Further, the factual allegations of the petition do not allege that Mother failed to supervise or protect D.W., and the court made no such findings. Nevertheless, Father argues that jurisdiction over D.W. was properly asserted because by leading police on a high-speed chase Mother caused substantial risk of harm to D.W. because Mother could have died or been imprisoned, citing *In re Alexis H*. (2005) 132 Cal.App.4th 11 and *In re James C*. (2002) 104 Cal.App.4th 470. Those cases do not assist Father. In *In re Alexis H*., the appellate court determined that the mother's conduct, including letting the father of one of the minors use and store drugs within access of the minors and fighting with the appellant father, had endangered the minors sufficiently to establish jurisdiction. (*In re Alexis H*., *supra*, 132 Cal.App.4th pp. 13, 16.) The court then noted in dicta, "[b]e that as it may, appellant in any event admitted he was in prison for drug possession. While in prison, he cannot care for or supervise his children, rendering his imprisonment enough for the court to exercise jurisdiction under section 300, subdivision (b)." (*In re Alexis H.*, at p. 16.) Similarly, in *In re James C.*, the court noted that jurisdiction under section 300, subdivision (b) could be asserted based on the mother's conduct in permitting the minors to live in filthy and unsanitary conditions with a convicted sex offender. Again in dicta, the court noted that being incarcerated, the father could not supervise or adequately protect the minors from the deplorable conditions, including a

filthy home, untreated medical and dental conditions, living in a residence with a convicted sex offender, and lack of supervision of toddlers. (*In re James C.*, *supra*, 104 Cal.App.4th at p. 483.) The court then used language from section 300, subdivision (g)—which we discuss *post*—stating, "The juvenile court could infer that the father was either unable or unwilling to arrange for the care of the children." (*In re James C.*, at pp. 483–484.)

Here, by contrast, D.W. was not found in filthy or dangerous conditions caused by Mother's failure to protect or supervise. Nor did Mother allow others to use and store drugs within D.W.'s access. Instead, Mother arranged for her to be cared for by maternal aunt, who provided a safe, nurturing, loving environment, or by maternal grandmother. And Father was determined to be nonoffending by the court and D.W. ultimately was placed in his custody.

Under section 300, subdivision (g), a minor can be adjudged a dependent of the court if, among other things, "the child's parent has been incarcerated or institutionalized and cannot arrange for the care of the child." "There is no 'Go to jail, lose your child' rule in California." (*In re S.D.* (2002) 99 Cal.App.4th 1068, 1077.) If a parent can arrange for care of the minor during the period of incarceration, the court has no basis to take jurisdiction. (*Ibid.*) As previously discussed, the record shows that Mother arranged for care of D.W. by maternal grandmother or maternal great aunt. DCFS placed D.W. with maternal great aunt and the juvenile court determined that placement with maternal grandmother was an appropriate plan. Therefore, an order finding jurisdiction under section 300, subdivision (g), would not have been supported by substantial evidence.

DISPOSITION

The August 29, 2011 jurisdictional and dispositional orders are reversed.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

CHANEY, J.

JOHNSON, J.